CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 842

GALEN L. TAIT, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

WESTERN MARYLAND RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 7, 1933
CERTIORARI GRANTED APRIL 24, 1933

(37539)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 842

GALEN L. TAIT, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

WESTERN MARYLAND RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Record from D. C. U. S., District of Maryland	
Caption	1
Amended declaration, No. 4172 law	1
Pleas	2
Declaration, No. 4174 law	5
Pleas	6
Declaration, in nature of petition, No. 4177 law	8
Affidavit of service	8
Amended declaration, No. 4469 law	11
Pleas	11
Stipulation of counsel waiving jury trial	15
Petition and order for consolidation, cases Nos. 4172, 4174, and 4469 law	16
Petition and order for consolidation of case No. 4177 law with 4172, 4174, and 4469 law	17
Defendant's request for findings of facts	19
Defendant's request for conclusions of law	21
Defendant's motion for verdict	22
Plaintiff's prayers	22
Verdict and judgment	23
Petition, consent, and order of court extending time for signing bill of exceptions for sixty days from 18th November, 1931	24
Petition, consent, and order of court extending time for signing bill of exceptions for fifteen days from 15th January, 1932	25
Bill of exceptions	27
Caption	29
Stipulation as to facts	29
Defendant's request for conclusions of law	29
Defendant's request for findings of facts	37
Defendant's motion for judgment	38
Opinion of court	38

Record from D. C. U. S., District of Maryland—Continued Page
Order settling bill of exceptions 45
Assignments of error 45
Stipulation re transcript of record 46
Memorandum re appeal papers 48
Order to transmit record 48
Clerk's certificate 49
Proceedings in U. S. C. C. A., Fourth Circuit 51
Docket entries 51
Minute entry of argument and submission 51
Opinion, Soper, J. 52
Concurring opinion, Northcott, J. 56
Judgment 57
Order staying mandate 57
Order further staying mandate 57
Clerk's certificate 58
Order allowing certiorari 59

TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, To-wit:

At a District Court of the United States for the District of Maryland, begun and held in the City of Baltimore on the first Tuesday in September, (being the 1st day of the same month) in the year of our Lord one thousand nine hundred and thirty-one.

Present: The Honorable William C. Coleman, Judge Maryland District; Simon E. Sobeloff, Esq., Attorney; George W. Collier, Esq., Marshal; Arthur L. Spamer, Clerk.

Among other were the following proceedings, to-wit:

Western Maryland Railway Company, a corporation, *vs.* Galen L. Tait, Collector of Internal Revenue of the United States for the District of Maryland.	No. 4172 Law.
Western Maryland Railway Company, a corporation, *vs.* The United States of America.	No. 4174 Law.
Western Maryland Railway Company, a corporation, *vs.* The United States of America.	No. 4177 Law.
Western Maryland Railway Company, a corporation, *vs.* Galen L. Tait, Collector of Internal Revenue of the United States for the District of Maryland.	No. 4469 Law. Consolidated Cases.

AMENDED DECLARATION, NO. 4172 LAW.

(2) Filed 2nd April, 1932.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.

Law No. 4172.

Plaintiff, Western Maryland Railway Company, a corporation organized and existing under the laws of the State of Maryland, by this its Amended Declaration, sues Galen L. Tait, Collector of Internal Revenue of the United States for the District of Maryland, for that:

COUNT ONE.

Plaintiff in compliance with the Act of Congress approved February 24, 1919, otherwise known as the Revenue Act of 1919, duly filed its annual income tax return for the calendar year 1920, and paid to defendant the amount of income tax shown thereby to be due, in equal quarterly installments, to wit: on or about March 15th, June 15th, September 15th and December 15th, 1921.

That prior to said year, plaintiff had sold its First Mortgage 4% Gold Bonds, maturing October 1, 1952, in the face amount of $46,633,000, at a total discount of $3,638,451.67. That amortizing said discount by spreading the same *rateably* over the life of said bonds, the yearly proportion thereof apportionable to said year 1920 was, and still is $80,796.24.

Plaintiff avers that under the aforementioned Revenue Act of 1919 and the regulations appertaining thereto, it was, and still is, entitled to deduct said $80,796.24 from its gross income for said calendar year 1920. That plaintiff erroneously failed to make said deduction in its return, and at the tax rate of 10% applicable for said
(3) year 1920 has erroneously paid to defendant the

sum of $8,079.62 as income taxes in excess of the amount lawfully due and payable by the plaintiff.

That plaintiff has duly filed its claim for refund of said $8,079.62 with the Commissioner of Internal Revenue upon the grounds above alleged, but said Commissioner has refused and continues to refuse to refund or repay said sum to the plaintiff.

Plaintiff, therefore, alleges that by reason of said presents defendant became, and still is, liable to plaintiff in the sum of $8,079.62, with interest from the date of payment thereof.

COUNT TWO.

And for that plaintiff in compliance with the Act of Congress approved November 23, 1921, otherwise known as the Revenue Act of 1921, duly filed its annual income tax return for the calendar year 1921, and paid to defendant the amount of income tax shown thereby to be due, in equal quarterly installments, to wit: on or about March 15th, June 15th, September 15th and December 15th, 1921.

That prior to said year plaintiff had sold its First Mortgage 4% Gold Bonds, maturing October 1, 1952, in the face amount of $46,633,000, at a total discount of $3,638,451.67. That amortizing said discount by spreading the same *rateably* over the life of said bonds, the yearly proportion thereof apportionable to said year 1921 was, and still is, $80,796.24.

Plaintiff avers that under the aforementioned Revenue Act of 1921 and the regulations appertaining thereto, it was, and still is, entitled to deduct said $80,796.24 from its gross income for said calendar year 1921. That plaintiff erroneously failed to make said deduction in its return, and at the tax rate of 10% applicable for said year 1921 has erroneously paid the defendant the sum of $8,079.62 as income taxes in excess of the amount lawfully due and payable by the plaintiff.

That plaintiff has duly filed its claim for refund of (4) said $8,079.62 with the Commissioner or Internal Revenue upon the grounds above alleged, but said Commissioner has refused and continues to refuse to refund or repay said sum to the plaintiff.

Plaintiff, therefore, alleges that by reason of said

presents defendant became and still is liable to plaintiff in the sum of $8,079.62 with interest from the date of payment thereof.

COUNT THREE.

And for that plaintiff in compliance with the Act of Congress approved November 23, 1921, otherwise known as the Revenue Act of 1921, duly filed its annual income tax return for the calendar year 1922 and paid to defendant the amount of income tax shown thereby to be due, in equal quarterly installments, to wit: on or about March 15th, June 15th, September 15th and December 15th, 1921.

That prior to said year plaintiff had sold its First Mortgage 4% Gold Bonds, maturing October 1, 1952, in the face amount of $46,633,000, at a total discount of $3,638,451.67. That amortizing said discount by spreading the same *rateably* over the life of said bonds, the yearly proportion thereof apportionable to said year 1922 was, and still is, $80,796.24.

Plaintiff avers that under the aforementioned Revenue Act of 1921 and the regulations appertaining thereto, it was, and still is, entitled to deduct said $80,796.24 from its gross income for said calendar year 1922. That Plaintiff erroneously failed to make said deduction in its return, and at the rate of 12½% applicable for said year 1922 has erroneously paid the defendant the sum of $10,099.53 as income taxes in excess of the amount lawfully due and payable by the plaintiff.

That plaintiff has duly filed its claim for refund of said $10,099.53 with the Commissioner of Internal Revenue upon the grounds above alleged, but said Commissioner has refused and continues to refuse to refund or repay said sum to the plaintiff.

Plaintiff, therefore, alleges that by reason of said presents defendant became and still is liable to plaintiff (5) in the sum of $10,099.53 with interest from the date of payment thereof.

Wherefore, plaintiff brings this suit and claims as damages the sum of $50,000.00.

EUGENE S. WILLIAMS,
Attorney for Plaintiff.

To the Defendant:

Take notice, that in accordance with the rules of the United States District Court for the District of Maryland, you will be required to plead to the above Declaration before the return day subsequent to that to which you may be summoned, or else judgment by default may be entered against you.

EUGENE S. WILLIAMS,
Attorney for Plaintiff.

PLEAS.

(6) Filed 28th May, 1931.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
} Law No. 4172.

The defendant, Galen L. Tait, Collector of Internal Revenue for the District of Maryland, by Simon E. Sobeloff, United States Attorney, says for pleas to the declaration and the amended declaration, and to each and every count thereof:

1. That he never promised as alleged.

2. That he is not indebted as alleged.

SIMON E. SOBELOFF,
United States Attorney.

DECLARATION NO. 4174 LAW.

(7) Filed 2nd December, 1929.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,

vs.

The United States, Defendant.

Western Maryland Railway Company, a corporation organized and existing under the laws of the State of Maryland, by George P. Bagby and Eugene S. Williams, its attorneys, sues The United States,

For money due and payable by the defendant to the plaintiff.

1. For money received by the defendant for the use of the plaintiff.

2. For money found to be due by the defendant to the plaintiff on accounts stated between them.

THIRD COUNT.

For that the plaintiff, whose principal office is, and at the times hereinafter referred to was, located at Baltimore, Md., in compliance with an Act of Congress known as the Revenue Act of 1919, duly filed its annual income tax return for the year 1920 with Joshua W. Miles, then Collector of Internal Revenue for the District of Maryland, but now deceased, and paid to the said Joshua W. Miles the amount of income taxes shown in said return to be due, in equal quarterly installments, on March 15th, June 15th, September 15th and December 15th, 1921.

Plaintiff avers that said return was erroneous and showed taxes to be due in excess of the amount actually and legally due for the year 1920 in that, in computing the taxable income so reported for said year, plaintiff failed to deduct from its gross income any portion of the discount at which certain of its mortgage bonds, bearing maturity date of October 1, 1952, were sold prior

(8) to said year 1920, which said discount aggregated $3,638,451.67. Plaintiff further avers that for the year 1920, and at the time said bonds were sold, its income accounts were, and ever since have been, kept on an accrual basis; that under the provisions of the said Revenue Act and the Regulations of the Treasury Department of the United States issued under said Act, plaintiff was and is entitled to amortize said discount, in arriving at its taxable income, by spreading said discount over the life of the bonds and deducting the yearly proportion thereof from its gross income; that the annual proportion of said discount, so spread *rateably* over the life of the bonds, is $80,796.24; that the tax rate applicable to the tapable income for said year 1920 was 10 per cent and that plaintiff, therefore, erroneously paid to defendant the sum of $8,079.62 in excess of taxes lawfully due and payable by the plaintiff.

Plaintiff, on or about the 5th day of January, 1925, filed with Galen L. Tait, then Collection of Internal Revenue for the District of Maryland, its claim for refund of the said sum of $8,079.62 and interest thereon from dates of payment, but defendant has failed and refused, and does now refuse, to refund or pay said sum to plaintiff.

Plaintiff, therefore, alleges that defendant became, and is, liable to the plaintiff in the aforesaid sum of $8,079.62, with interest thereon from dates of payment as aforesaid. Wherefore, plaintiff brings this suit and claims $15,000 damages.

GEORGE P. BAGBY,
EUGENE S. WILLIAMS,
Attorneys for Plaintiff.

To the Defendant—

Take notice, that in accordance with the rules of the United States District Court for the District of Maryland, you will be required to plead to the above Declaration before the return day subsequent to that to which you may be summoned, or else judgment by default may be entered against you.

GEORGE P. BAGBY,
EUGENE S. WILLIAMS,
Attorneys for Plaintiff.

PLEAS.

(9) Filed 28th May, 1931.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
The United States, Defendant. } Law 4174.

The defendant, the United States, by Simon E. Sobeloff, United States Attorney, says for pleas to the declaration and to each and every count thereof:

1. That the defendant never promised as alleged.

2. That the defendant is not indebted as alleged.

SIMON E. SOBELOFF,
United States Attorney.

DECLARATION, IN NATURE OF PETITION, NO. 4177 LAW

(10) Filed 3rd December, 1929.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Petitioner,
vs.
The United States, Respondent.

To the Honorable the District Court of the United States for the District of Maryland:

The petitioner, Western Maryland Railway Company, respectfully represents:

1. That petitioner is a corporation organized and

existing under the laws of the State of Maryland, and that its principal office is in Baltimore, Md.

2. That petitioner, in compliance with an Act of Congress known as the Revenue Act of 1919, duly filed its annual income tax return for the year 1920 with Joshua W. Miles, then Collector of Internal Revenue for the District of Maryland, but now deceased, and paid to the said Joshua W. Miles the amount of income taxes shown in said return to be due, in equal quarterly installments, on March 15th, June 15th, September 15th and December 15th, 1921.

3. Petitioner further represents that said return was erroneous and showed taxes to be due in excess of the amount actually and legally due for the year 1920 in that, in computing the taxable income so reported for said year, petitioner failed to deduct from its gross income any portion of the discount at which certain of its mortgage bonds, bearing maturity date of October 1, 1952, were sold prior to said year 1920, which said discount aggregated $3,638,451.67. Petitioner further represents that for the year 1920, and at the time said bonds were sold, its income accounts were, and ever since have been, kept on an accrual basis; that under the provis-
(11) ions of the said Revenue Act and the Regulation of the Treasury Department of the United States issued under said Act, petitioner was and is entitled to amortize said discount, in arriving at its taxable income, by spreading said discount over the life of the bonds and deducting the yearly proportion thereof from its gross income; that the annual proportion of said discount, so spread *ratably* over the life of the bonds, is $80,796.24; that the tax rate applicable to the taxable income for said year 1920 was 10 per cent and that petitioner, therefore, erroneously paid to said Joshua W. Miles, as Collector of Internal Revenue as aforesaid, the sum of $8,079.62 in excess of taxes lawfully due and payable by the petitioner.

4. That petitioner, on or about the 5th day of January, 1925, filed with Galen L. Tait, then Collector of

Internal Revenue for the District of Maryland, its claim for refund of the said sum of $8,079.62 and interest thereon from dates of payment, but respondent has failed and refused, and does now refuse, to refund or pay said sum to petitioner.

Wherefore, petitioner prays judgment for such sum of money that may be justly due and owing it, amounting to $8,079.62 with interest thereon from date of payment as aforesaid, and such further and other relief to which it may appear petitioner is entitled.

WESTERN MARYLAND RAILWAY COMPANY,
By S. R. GEHLERT, Treasurer.

GEORGE P. BAGBY,
EUGENE S. WILLIAMS,
Attorneys for Petitioner.

STATE OF MARYLAND,
(12) City of Baltimore, To-wit:

S. R. Gehlert, being first duly sworn on oath, deposes and says that he is the Treasurer of the above named petitioner, and has knowledge of the matters and things above set forth; that each of the allegations contained in above Petition are true both in substance and in fact, to the best of his knowledge, information and belief.

S. R. GEHLERT.

Subscribed and sworn to before me this 3rd day of December, 1929.

G. I. CHARLTON,
(Notarial Seal) Notary Public.

My Commission expires May 1931.

AFFIDAVIT OF SERVICE.

(13) Filed 6th December, 1929.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Petitioner,

vs.

The United States, Respondent.

STATE OF MARYLAND,
City of Baltimore, To-wit:

We hereby certify that on the 3rd day of December, 1929, we caused a copy of the Petition filed in the above styled proceeding to be served upon Amos W. W. Woodcock, District Attorney of the United States for the District of Maryland, and on the same date mailed a copy of said Petition by registered letter to the Attorney General of the United States.

GEORGE P. BAGBY,
EUGENE S. WILLIAMS,
Attorneys for Petitioner.

Subscribed and sworn to before me this 3rd day of December, 1929.

G. I. CHARLTON,
(Notarial Seal) Notary Public.

My commission expires May 1931.

AMENDED DECLARATION, NO. 4469 LAW.

(14) Filed 27th May, 1931.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,

vs.

Galen L. Tait, Collector of Internal Revenue, Defendant.

Law No. 4469.

Plaintiff, Western Maryland Railway Company, a

corporation organized and existing under the laws of the State of Maryland, by this its amended declaration, sues Galen L. Tait, Collector of Internal Revenue of the United States for the District of Maryland, for that:

FIRST COUNT.

Plaintiff, in compliance with the Act of Congress approved November 23, 1921, otherwise known as the Revenue Act of 1921, duly filed its annual income tax return for the calendar year 1923, and paid to defendant the amount of income tax shown thereby to be due, in equal quarterly installments to wit: March 15, June 14, September 15 and December 15, 1924.

Prior to said year 1923 plaintiff had sold its First Mortgage 4 Per Cent Gold Bonds, maturing October 1, 1952, in the principal amount of $46,633,000, at a total discount of $3,638,451.67. That amortizing said discount by spreading the same *rateably* over the life of said bonds, the yearly proportion thereof apportionable to said year 1923 was, and still is, $80,796.24.

Plaintiff avers that under the aforementioned Revenue Act of 1921, and the regulations appertaining thereto, it was, and still is, entitled to deduct said $80,796.24 from its gross income for said calendar year 1923. Plaintiff, in arriving at its taxable net income for said year, made said deduction accordingly. Subsequently, the Commissioner of Internal Revenue ordered an audit to be made of plaintiff's income tax return for said calendar year 1923, and, as a consequence thereof, disallowed said deduction to plaintiff, demanding payment of additional taxes upon said sum of $80,796.24 at the then prevailing tax rate of 12½%. Plaintiff, on or (15) about December 4, 1930, paid said additional tax, amounting to $10,099.53, under protest and in order to avoid imposition of heavy penalties and distraint upon its property.

Plaintiff has duly filed its claim for refund of said $10,099.53 with the Commissioner of Internal Revenue, upon the grounds above alleged, but said Commissioner has refused and continues to refuse to refund or repay said sum to plaintiff.

Plaintiff, therefore, alleges that by reason of said presents defendant became, and still is, liable to plaintiff in the sum of $10,099.53, with interest from the date of payment thereof.

SECOND COUNT.

Plaintiff, in compliance with the Act of Congress approved June 2, 1924, otherwise known as the Revenue Act of 1924, duly filed its annual income tax return for the calendar year 1924, and paid to defendant the amount of income tax shown thereby to be due in equal quarterly instalments, to wit: March 16, June 16, September 18, December 17, 1925.

Prior to said year 1924 plaintiff had sold its First Mortgage 4 Per Cent Gold Bonds, maturing October 1, 1952, in the principal amount of $46,633,000, at a total discount of $3,638,451.67. That amortizing said discount by spreading the same *ratably* over the life of said bonds, the yearly proportion thereof apportionable to said year 1924 was, and still is, $80,796.24.

Plaintiff avers that under the aforementioned Revenue Act of 1924, and the regulations appertaining thereto, it was, and still is, entitled to deduct said $80,796.24 from its gross income for said calendar year 1924. Plaintiff, in arriving at its taxable net income for said year, made said deduction accordingly. Subsequently, the Commissioner of Internal Revenue ordered an audit to be made of plaintiff's income tax return for said calendar year 1924, and, as a consequence thereof, disallowed said deduction to plaintiff, demanding payment of additional taxes upon said sum of $80,796.24 at the then prevailing tax rate of 12½%. Plaintiff, on or about December 4, 1930, paid said additional tax, amounting to $10,099.53, under protest and in order to avoid imposition of heavy penalties and distraint upon its property.

Plaintiff has duly filed its claim for refund of said $10,099.53 with the Commissioner of Internal Revenue (16) upon the grounds above alleged, but said Commissioner has refused and continues to refuse to refund or repay said sum to plaintiff.

Plaintiff, therefore, alleges that by reason of said

presents defendant became, and still is, liable to plaintiff in the sum of $10,099.53, with interest from the date of payment thereof.

THIRD COUNT.

Plaintiff, in compliance with the Act of Congress approved June 2, 1924, otherwise known as the Revenue Act of 1924, duly files its annual income tax return for the calendar year 1925, and paid to defendant the amount of income tax shown thereby to be due, in equal quarterly instalments to wit: March 16, June 16, September 16, December 16, 1926.

Prior to said year 1925 plaintiff had sold its First Mortgage 4 Per cent Gold Bonds, maturing October 1, 1952, in the principal amount of $46,633,000, at a total discount of $3,638,451.67. That amortizing said discount by spreading the same *rateably* over the life of said bonds, the yearly proportion thereof apportionable to said year 1925 was, and still is, $80,796.24.

Plaintiff avers that under the aforementioned Revenue Act of 1924, and the regulations appertaining thereto, it was, and still is, entitled to deduct said $80,796.24 from its gross income for said calendar year 1925. Plaintiff, in arriving at its taxable net income for said year, made said deduction accordingly. Subsequently, the Commissioner of Internal Revenue ordered an audit to be made of plaintiff's income tax return for said calendar year 1925, and, as a consequence thereof, disallowed said deduction to plaintiff, demanding payment of additional taxes upon said sum of $80,796.24 at the then prevailing tax rate of 12½%. Plaintiff, on or about December 4, 1930, paid said additional tax amounting to $10,099.53, under protest and in order to avoid imposition of heavy penalties and distraint upon its property.

Plaintiff has duly filed its claim for refund of said $10,099.53 with the Commissioner of Internal Revenue, (17) upon the grounds above alleged, but said Commissioner has refused and continues to refuse to refund or repay said sum to plaintiff.

Plaintiff, therefore, alleges that by reason of said presents defendant became, and still is, liable to plain-

tiff in the sum of $10,099.53, with interest from the date of payment thereof.

Wherefore, plaintiff brings this suit and claims as damages the sum of Fifty Thousand ($50,000.00) Dollars.

EUGENE S. WILLIAMS,
Attorney for Plaintiff.

To the Defendant—

Take notice, that in accordance with the rules of the United States District Court for the District of Maryland, you will be required to plead to the above Declaration before the return day subsequent to that to which you may be summoned, or else judgment by default may be entered against you.

EUGENE S. WILLIAMS,
Attorney for Plaintiff.

PLEAS.

(18) Filed 28th May, 1931.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
Law 4469.

The defendant, Galen L. Tait, Collector of Internal Revenue for the District of Maryland, by Simon E. Sobeloff, United States Attorney, says for pleas to the declaration and amended declaration and to each and every count thereof:

1. That he never promised as alleged.

2. That he is not indebted as alleged.

SIMON E. SOBELOFF,
United States Attorney.

STIPULATION OF COUNSEL WAIVING JURY TRIAL.

(19) Filed 28th May, 1931.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
Law No. 4172.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
The United States, Defendant.
Law No. 4174.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
Law No. 4469.

It is hereby stipulated and agreed by and between the parties to the above entitled causes, by their respective counsel of record, that a jury trial be waived and that the issues herein be tried by the Court without the aid or intervention of a jury.

EUGENE S. WILLIAMS,
Counsel for Plaintiff in Law Nos. 4172, 4174 and 4469.

SIMON E. SOBELOFF,
Counsel for Defendants in Law Nos. 4172, 4174 and 4469.

PETITION AND ORDER FOR CONSOLIDATION.

(20) Filed 28th May, 1931.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
The United States, Defendant.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.

To the Honorable Judge of said Court:

The petition of Western Maryland Railway Company, by Eugene S. Williams, its attorney, respectfully represents:

1. That there are pending on the law side of this Honorable Court three (3) suits filed by petitioner for the recovery of certain income taxes and which are more particularly described as follows:

(A) Western Maryland Railway Company *vs.* Tait, Docket No. 4172, consisting of three counts covering taxable years 1920, 1921 and 1922, each count alleging that plaintiff is entitled to recover certain overpayments of income taxes amounting in all to Twenty-Six Thousand Two Hundred Fifty-eight Dollars and Seventy-Seven Cents ($26,258.77).

(B) Western Maryland Railway Company *vs.* United States, Docket No. 4174, which consists of one

(21) count alleging overpayment of Eight Thousand Seventy-nine Dollars and Sixty-Two Cents ($8,079.62) of income taxes in the year 1920, said suit having been filed after the death of Joshua W. Miles, as Collector of Internal Revenue for the District of Maryland, and in order to name the United States as Defendant, and thereby to preserve plaintiff's rights of action for said year 1920.

(C) Western Maryland Railway Company *vs.* Tait, Docket No. 4469, which consists of three counts for the taxable years 1923, 1924 and 1925, and each of which alleges that plaintiff is entitled to recover certain overpayments of income taxes amounting in all to Thirty-Thousand, Two Hundred Ninety-Eight Dollars and Fifty-Nine Cents, ($30,298.59).

2. That in each of said suits identical questions of law are involved as well as identical matters of fact, which latter are covered by a stipulation of counsel to be filed in advance of the hearing.

3. That petitioner believes it will greatly facilitate the disposition of said suits if they may be consolidated and treated as one for the purposes of trial, verdict and judgment.

Wherefore petitioner prays that an order be passed consolidating the three suits at law herein described.

And as in duty bound.

EUGENE S. WILLIAMS,
Attorney for Petitioner.

Upon the foregoing petition and order, it is this 28th day of May, 1931, by the United States District Court in and for the District of Maryland

Ordered, that the suits at law entitled Western Maryland Railway Company *vs.* Tait, Docket No. 4172, Western Maryland Railway Company *vs.* United States, Docket No. 4175, and Western Maryland Railway Com-

pany *vs.* Tait, Docket No. 4469, be, and they are hereby consolidated.

WILLIAM C. COLEMAN,
United States District Judge.

PETITION AN DORDER OF COURT CONSOLIDATING CASE NUMBER 4177 LAW WITH CASES NUMBERS 4172, 4174 AND 4469 LAW DOCKET, TO TAKE EFFECT AS OF MAY 28TH, 1931.

(22) Filed 21st April, 1932.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company
vs.
The United States of America. } No. 4177.
Law Docket

To the Honorable Judges of said Court:

The petition of Western Maryland Railway Company, a corporation, by Eugene S. Williams, its attorney, represents:

1. That it has heretofore filed before this Court four (4) suits for the recovery of certain Income Taxes for the years 1920 to 1925 inclusive, as follows:

Law No. 4172, Western Maryland Railway Company *vs.* Tait,

Law No. 4174, Western Maryland Railway Company *vs.* The United States of America,

Law No. 4177, Western Maryland Railway Company *vs.* The United States of America,

Law No. 4469, Western Maryland Railway Company *vs.* Tait.

2. That by order of this Honorable Court dated May 28, 1931, three (3) of said suits, to wit: Nos. 4172, 4174 and 4469, were consolidated and thereafter tried as one (1), and a judgment rendered in favor of petitioner in all suits as consolidated, on October 22, 1931.

3. Law Nos. 4177 and 4174 both seek recovery of Income Taxes for the year 1920 and are identical in every respect except that 4177 is filed in the form of a petition, and 4174 in the form of a declaration, these said suits having been separately instituted in order to preserve petitioner's rights to recover Income Taxes for said year by making the United States a party defendant, the Collector of Internal Revenue, the Honorable Joshua (23) W. Miles, being at that time deceased.

4. That Law No. 4177 was by inadvertence omitted from the petition for an order of consolidation aforementioned, and is therefore now standing open upon Law Docket, assigned for trial April 12, 1932.

Wherefore, petitioner prays that inasmuch as all questions involved in said Law No. 4177 have been determined by the judgment rendered on October 22, 1931, the said suit be ordered consolidated with the other three (3) suits hereinbefore mentioned.

And as in duty bound, etc.

EUGENE S. WILLIAMS,
Attorney for Petitioner.

I hereby assent to the passage of an order as prayed.

SIMON E. SOBELOFF,
U. S. Attorney.
E. H. M.

The foregoing petition having been read and considered, it is by the United States District Court, in and for the District of Maryland, this 21st day of April, 1932, ordered that the proceeding entitled Western Mary-

land Railway Company *vs.* The United States of America, and numbered 4177 upon the Law Docket of this Court be, and the same is hereby, consolidated with Law Nos. 4172, 4174 and 4469, heretofore consolidated by order dated May 28, 1931; and it is further ordered that this order of consolidation take effect as of May 28, 1931.

WILLIAM C. COLEMAN,
United States District Judge.

DEFENDANT'S REQUEST FOR FINDING OF FACTS.

(24) Filed 28th May, 1931.

Western Maryland Railway Company, a corporation, Plaintiff, *vs.* Galen L. Tait, Collector of Internal Revenue, Defendant.	Law No. 4172
Western Maryland Railway Company, a corporation, Plaintiff, *vs.* The United States, Defendant.	Law No. 4174.
Western Maryland Railway Company, a corporation, Plaintiff, *vs.* Galen L. Tait, Collector of Internal Revenue, Defendant.	Law No. 4469.

It is requested that the Court make and return in the above-mentioned cases special finding of facts in the manner of and as set forth in the stipulation of facts filed herein.

SIMON E. SOBELOFF,
Attorney for Defendants.

DEFENDANT'S REQUEST FOR CONCLUSIONS OF LAW.

(25) Filed 28th May, 1931.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
Law No. 4172

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
The United States, Defendant.
Law No. 4174.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
Law No. 4469.

It is requested that the Court find and return as a conclusion of law that the plaintiff, in the determination of his tax liability for the years in question, is not entitled to amortize and deduct from income for said years any portion of the bond discount herein involved.

SIMON E. SOBELOFF,
Attorney for Defendants.

DEFENDANT'S MOTION FOR VERDICT.

(26) Filed 28th May, 1931.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
Law No. 4172

Western Maryland Railway Company, a corporation, Plaintiff, *vs.* The United States, Defendant.	Law No. 4174.
Western Maryland Railway Company, a corporation, Plaintiff, *vs.* Galen L. Tait, Collector of Internal Revenue, Defendant.	Law No. 4469.

The defendants herein, and each of them, move the Court for judgment in favor of the defendants.

SIMON E. SOBELOFF,
Attorney for Defendants.

PLAINTIFF'S PRAYERS.

(27) Filed 28th May, 1931.

PLAINTIFF'S 1ST PRAYER.

Plaintiff prays the Court to instruct itself that under all of the evidence presented in the case the verdict must, as a matter of law, be for the plaintiff.

PLAINTIFF'S 2ND PRAYER.

Plaintiff prays the Court to instruct itself that the issue involved in this case is the same issue as has already been determined in a previous proceeding between plaintiff and defendants or their privy.

PLAINTIFF'S 3RD PRAYER.

Plaintiff prays the Court to instruct itself that the issue involved in this case has heretofore been adjudicated in favor of the plaintiff, and that the judgment in this case, must, therefore, be for the plaintiff.

PLAINTIFF'S 4TH PRAYER.

Plaintiff prays the Court to instruct itself that all of the evidence presented relating to the reorganization as of January 1, 1910, and the evidence relating to any differences between Western Maryland Rail Road Company *the* The Western Maryland Railway Company, is inadmissible and not to be considered in this proceeding by reason of the previous adjudication in favor of the plaintiff.

PLAINTIFF'S 5TH PRAYER.

Plaintiff prays the Court to instruct itself that all of the evidence presented relating to the consolidation as of February 15, 1917, and the evidence relating to any dif-
(28) ferences between The Western Maryland Railway Company and Western Maryland Railway Company, is inadmissible and not to be considered in this proceeding by reason of the previous adjudication in favor of the plaintiff.

(29) **VERDICT AND JUDGMENT.**

Whereupon, the issues joined as aforesaid between the parties aforesaid were tried before the Court without a Jury upon a stipulation of facts agreed upon by counsel, and the Court having considered same, doth find for the plaintiff and assess the damages of said plaintiff to the sum of Fifty Six Thousand Five Hundred Fifty Seven Dollars and thirty six cents, with interest as provided by the Statute, Sec. 177 of the Judicial Code as amended.

JUDGMENT.

Therefore it is considered by the Court here that the said plaintiff recover against the said defendant as well the said sum of Fifty six thousand five hundred fifty seven dollars and thirty six cents aforesaid, as the sum of Sixty dollars ($60.00), adjudged by the Court unto the said plaintiff for its costs and charges about its suit in its behalf expended.

MEMORANDUM.

Verdict was rendered in the above entitled case on the 20th day of October, 1931, and Judgment on the 22nd day of October, 1931.

PETITION, CONSENT AND ORDER OF COURT EXTENDING THE TIME FOR SIGNING AND FILING THE BILL OF EXCEPTIONS HEREIN SIXTY DAYS FROM 18TH NOVEMBER, 1931.

(30) Filed 18th November, 1931.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff, Galen L. Tait, Collector of Internal Revenue, Defendant.	
Western Maryland Railway Company, a corporation, Plaintiff, *vs.* The United States of America, a sovereign, Defendant.	Law Numbers 4172, 4174 and 4469.
Western Maryland Railway Company, a corporation, Plaintiff, *vs.* Galen L. Tait, Collector of Internal Revenue, Defendant.	

To the Honorable the Judge of said Court:

The petition of Galen L. Tait, Collector of Internal Revenue, by Simon E. Sobeloff, United States Attorney in and for the District of Maryland, respectfully represents:

First: That on the 20th day of October, 1931, there was entered in the above entitled cases by this Court a verdict in favor of the plaintiff in the sum of

Fifty-six Thousand, Five Hundred Fifty-seven dollars and Thirty-six Cents ($56,557.36) with interest, on which verdict there was entered a judgment *nisi*, and finally on the 22nd day of October, 1931, a judgment on the verdict absolute was entered in favor of the plaintiff, for said sum.

Second: That in order to protect the defendant's right of appeal in the above entitled cases, and according to Rule 39 of this Court, it is necessary that a (31) bill of exceptions be filed within thirty days from the entry of said judgment, to wit, on or before November 19, 1931.

Third: That it is not possible for the attorney for the defendant to prepare said bill of exceptions and fully agree as to the contents thereof with the attorney for the plaintiff on or before the said 19th day of November, 1931, according to the rule of this Court as above set forth.

Your Petitioner, therefore, prays that this Honorable Court pass its order extending the time for signing and filing the bill of exceptions in the above entitled cases for sixty days from the date of the order herein prayed.

SIMON E. SOBELOFF,
United States Attorney.

As Attorney for the Plaintiff in the above cases I have read the aforegoing petition, and do hereby consent to the extending of the time for signing and filing the bill of exceptions in the above cases for sixty days from the date of the order granting said extension.

WILLIAM C. PURNELL,
Attorney for Plaintiff.

(32) **ORDER OF COURT.**

Upon the aforegoing petition and consent it is Ordered this 18th day of November, 1931, that the time for

signing and filing the bill of exceptions in the above entitled cases be and the same is hereby extended for sixty days from the date of this order.

W. CALVIN CHESNUT,
United States District Judge.

PETITION, CONSENT AND ORDER OF COURT EXTENDING THE TIME FOR SIGNING AND FILING THE BILL OF EXCEPTIONS HEREIN FIFTEEN DAYS FROM 15TH JANUARY, 1932.

(33) Filed 15th January, 1932.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
} Law Number 4172

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
} Law Number 4174

Western Maryland Railway Company, a corporation, Plaintiff,
vs.
Galen L. Tait, Collector of Internal Revenue, Defendant.
} Law Number 4469

To the Honorable, the Judge of said Court:

The petition of Galen L. Tait, Collector of Internal Revenue, by Simon E. Sobeloff, United States Attorney in and for the District of Maryland, respectfully represents:

First: That on the 20th day of October, 1931, there was entered in the above entitled cases by this Court a verdict in favor of the plaintiff in the sum of (34) Fifty-six Thousand, Five Hundred Fifty-seven Dollars and Thirty-six Cents ($56,557.36) with interest, on which verdict there was entered a judgment *nisi*, and finally on the 22nd day of October, 1931, a judgment on the verdict absolute was entered in favor of the plaintiff for said sum.

Second: That by order of this Honorable Court upon petition and consent it was ordered on the 19th day of November, 1931, that the time for signing and filing the bill of exceptions in the above entitled cases be extended for sixty days from the date of said order, which will expire on the 19th of January, 1932.

Third. That it is not possible for the attorney for the defendant to prepare said bill of exceptions and fully agree as to the contents thereof with the attorney for the plaintiff on or before the said 19th day of January, 1932, according to the order of this Court as above set forth.

Your petitioner, therefore, prays that this Honorable Court pass its order extending the time for signing and filing the bill of exceptions in the above entitled cases for fifteen days from the date of the order herein prayed.

SIMON E. SOBELOFF,
United States Attorney.

As attorney for the plaintiff in the above cases I have read the aforegoing petition, and do hereby consent to the extending of the time for signing and filing the bill of exceptions in the above cases for fifteen days from the date of the order granting said extension.

EUGENE S. WILLIAMS,
Attorney for Plaintiff.

(35) **ORDER OF COURT.**

Upon the aforegoing petition and consent it is Ordered this 15th day of January, 1932, that the time for signing and filing the bill of exceptions in the above entitled cases be and the same is hereby extended for fifteen days from the date of this order.

WILLIAM C. COLEMAN,
United States District Judge.

BILL OF EXCEPTIONS.

(36) Filed 30th January, 1932.

(Style of court and Title omitted.)

Be It Remembered, That heretofore, to wit, on the 28th day of May, 1931, at a stated term of said Court begun and holden in Baltimore, in and for the District of Maryland, before his Honor, William C. Coleman, District Judge, the issues joined in the above stated cause between the said parties came on to be tried before the said judge without the intervention of a jury, the parties aforesaid by their counsel having, according to the statute in such case made and provided, waived a jury; the (37) plaintiff being represented by Eugene S. Williams, its attorney, and the defendants by Simon E. Sobeloff, his attorney.

It was stipulated and agreed by and between the parties hereto, by their respective counsel of record, that the following facts may be taken as true and so considered by the Court in the determination of the above styled causes, subject, however, to the right of either party to object to the admissibility of all or any part of the facts hereinafter stipulated upon the ground of irrelevancy and/or immateriality.

(1) The foregoing causes may be consolidated for hearing.

(2) The plaintiff abandons the Sixth and Seventh Counts of the original declaration in Law Number 4172.

(3) Plaintiff, Western Maryland Railway Company, has outstanding as its main obligation, which it assumed as hereinafter outlined, First Mortgage 4 Per cent Bonds in the aggregate amount of Forty-six Million Six Hundred Thirty-three Thousand ($46,633,000) Dollars. $42,518,000 of said bonds were credited and issued at a discount of $3,021,351.67 over the period from October, 1902, to December, 1908, by Western Maryland Rail Road Company, a corporation of the State of Maryland, and secured by a first mortgage on its property dated October 1, 1902.

The total authorized issue of said First Mortgage 4 Per cent Bonds, under the mortgage securing same, was Fifty Million Dollars and *The* Western Maryland *Railway* Company, successor to the said Western Maryland Rail Road Company as hereinafter set forth, in July and August, 1911, issued and sold, in addition to the Forty-two Million Five Hundred Eighteen Thousand ($42,518,000) Dollars of said bonds already outstanding, Four Million One Hundred Fifteen Thousand ($4,115,000) Dollars of said bonds at a total discount of Six Hun-
(38) dred Seventeen Thousand One Hundred ($617,100) Dollars, which bonds were issued in the name of Western Maryland Rail Road Company and were identical in every way with the bonds of the same series which had previously been sold by Western Maryland Rail Road Company as aforesaid, and which were secured by the same mortgage dated October 1, 1902.

On March 5, 1908, a receiver was appointed for Western Maryland Rail Road Company and its entire property was sold under Court proceedings brought to foreclose a second mortgage securing certain second mortgage bonds of said company. The property was purchased by a reorganization committee representing the holders of said second mortgage bonds, which property was thereafter sold and conveyed to *The* Western Maryland *Railway* Company, a new corporation created under the laws of the State of Maryland, for the purpose of acquiring and operating said property, and with charter provisions substantially the same as those of the old company, except as to the amount of authorized capital stock hereinafter mentioned. As a part of the purchase price of said property, which was taken subject to

the mortgage lien securing the payment of the said First Mortgage 4 Per cent Bonds here involved, *The* Western Maryland *Railway* Company assumed the obligation of said First Mortgage 4 Per cent Bonds and interest, and began the operation of the property on January 1, 1910.

In setting up its accounts as of that date it entered upon its books as a liability the face amount of said bonds, but did not record thereon the above-mentioned discount of $3,021,351.67 as such. Neither Western Maryland Railroad Company nor *The* Western Maryland *Railway* Company amortized said discount upon its books.

The above-mentioned discounts of $3,021,351.67 and $617,100.00, aggregating $3,638,451.67, represent the amount here sought to be amortized and deducted from gross income for the years in question.

(39) The aliquot portion of said discount of $3,021,-351.67 applicable to each of the years 1920, 1921, 1922, 1923, 1924, and 1925, if amortized, is $65,801.16 and the aliquot portion of said discount of $617,100.00 applicable to each of said years 1920, 1921, 1922, 1923, 1924, and 1925, if amortized, is $14,995.08.

Western Maryland Rail Road Company had outstanding at the time of the sale above referred to, in addition to the First Mortgage 4 Per cent Bonds, Ten Million ($10,000,000) Dollars of second mortgage bonds and Fifteen Million Six Hundred Eighty-five Thousand Four Hundred ($15,685,400) Dollars of capital stock with charter power to increase the amount thereof. The new company, *The* Western Maryland *Railway* Company, had an authorized capital stock issue of Fifty-Million ($50,000,000) Dollars common and Ten Million ($10,000,-000) Dollars preferred. Holders of the second mortgage bonds received the Ten Million ($10,000,000) Dollars preferred stock, and, in addition, Eight Hundred Thirty-six Thousand ($836,000) Dollars par value of common stock of the said new company in payment of overdue interest coupons on said second mortgage bonds. These bondholders were also permitted to purchase and did purchase Five Million ($5,000,000) Dollars par value of common stock upon payment of forty per cent thereof. The holders of the old capital stock upon payment of forty per cent of its par value, received in exchange share for share the new common stock to the extent of

the outstanding Fifteen Million Six Hundred Eighty-five Thousand Four Hundred ($15,685,400) Dollars.

Officers of the old company became officers of the new, and directors of the new company were, in part, the same as the directors of the old company.

The Western Maryland *Railway* Company operated the property from January 1, 1910, to February 15, 1917, when it was consolidated with its subsidiary companies and the property conveyed to its successor corporation, Western Maryland Railway Company, plaintiff (40) herein, in accordance with a certain agreement of consolidation dated January 23, 1917, a copy of which is attached hereto as a part hereof marked Exhibit A.

The consolidation was effected under Chapter 553 of the Acts of 1890 of the General Assembly of Maryland, as amended by Chapter 664 of the Acts of 1916, being Article 23, Section 218 of Bagby's Annotated Code of Maryland and in conformity with the Act of March 24, 1865, P. L. 49 and the Act of April 10, 1869, P. L. 24 of the Statute of Pennsylvania.

The plaintiff issued three classes of stock, to wit, first preferred in the amount of Seventeen Million Seven Hundred Sixty Thousand and Four Hundred ($17,760,400) Dollars, second preferred in the amount of Ten Million ($10,000,000) Dollars, and common in the amount of Fifty Million ($50,000,000) Dollars.

All clases of stock of the three companies here involved were of the par value of One Hundred ($100) Dollars per share and each share, both common and preferred, carried the right to one vote at all stockholders' meetings. The rights and preferences of the respective classes of stock of the plaintiff were and are as outlined at Article 7 (page 14) of Exhibit A attached hereto The preferred stock of *The* Western Maryland *Railway* Company was preferred as to dividends and in liquidating distributions of assets.

The common stock of *The* Western Maryland *Railway* Company was exchanged, share for share, for the common stock of the plaintiff. The preferred stock of *The* Western Maryland *Railway* Company was exchanged, share for share, for the second preferred stock of the plaintiff.

Except as set forth, *infra*, the first preferred stock of the plaintiff was issued to the holders of certain se-

cured promissory notes of *The* Western Maryland *Railway* Company which matured in 1915, and which, with accrued interest, equaled the amount of the first preferred stock which was issued. The stockholders of *The* (41) Western Maryland *Railway* Company were given the privilege of purchasing the first preferred stock of the consolidated company at par in the proportion of their respective holdings of the stock of *The* Western Maryland *Railway* Company. Substantially less than the majority of said stock was acquired under said privilege and the amount received from such sales was applied in payment of the debt evidenced by said notes. The balance of said first preferred stock was accepted at par by the noteholders in payment and in discharge of the notes and interest.

All of the subsidiary companies, mentioned on page 1 of the Exhibit A, were planned and organized by Western Maryland Rail Road Company as a convenient method of financing the construction of certain extensions of its line of railroad which were made from time to time. All of the capital stock of the respective subsidiaries was immediately issued to the said Rail Road Company, and a perpetual lease taken by the latter upon the properties of the former. The foregoing is to be modified only with respect to Baltimore and Harrisburg Railway Company, to the extent that that company had been in operation prior to the time that it was acquired as one of the subsidiary companies. Its capital stock was acquired, a perpetual lease taken upon its property, and the operation of its line merged with that of the Western Maryland Rail Road Company in the same manner as was done with reference to the other subsidiaries.

In the acquisition of the properties of the Western Maryland Rail Road Company by *The* Western Maryland *Railway* Company, as above set forth, the said *The* Western Maryland *Railway* Company acquired the stock of said subsidiaries and the aforesaid leases.

The operation of the properties of the subsidiaries by each parent company with its own line as a single system, under the leases above referred to, dates from 1881, in the case of the oldest lease, and from 1896, (42) in the case of the most recent lease.

None of the subsidiaries ever operated any of the properties to which they held title, or otherwise engaged

in carrying on business (except the Baltimore and Harrisburg Railway Company prior to the time it was acquired as hereinbefore explained). No separate books of account were kept, nor tariffs published by any of the subsidiaries, but *The* Western Maryland *Railway* Company and its predecessor, Western Maryland Rail Road Company, operated their own properties and those of the subsidiaries as a single system, under the name of *The* Western Maryland *Railway* Company or of Western Maryland Rail Road Company prior to January 1, 1910, and so reported annually to the Interstate Commerce Commission. The tariff publications of both companies applied to each respectively and their subsidiaries as a unit, and the names of the subsidiaries did not appear in the tariffs. Such tariff publications were on file with the Interstate Commerce Commission in compliance with an Act of Congress known as the Interstate Commerce Act, and with the Public Service Commissions of the State of Maryland, Pennsylvania and West Virginia, within which states the railroad system operated, in pursuance of the statutory requirements of those states. When the plaintiff took over the operation of the properties in 1917 and when *The* Western Maryland *Railway* Company took over the operation of the properties in 1910, these tariffs were not cancelled, but remained under the name of the latter company and/or of Western Maryland Rail Road Company and were applied just as they had been prior to the consolidation or the 1910 reorganization.

All taxes, federal, state and local, upon the properties of the subsidiaries prior to 1910 were paid by Western Maryland Rail Road Company and by *The* Western Maryland *Railway* Company, prior to 1917, in accordance with the requirements of the terms of the leases.

The officers and directors of *The* Western Maryland *Railway* Company, and prior to 1910, of the Western Maryland Rail Road Company, were also the officers and (43) directors of the subsidiary corporations. And the officers and the directors of *The* Western Maryland *Railway* Company became the officers and directors of the plaintiff.

The bonds of such of the subsidiaries as had issued bonds, remained outstanding after 1910 all of which were recognized and treated by *The* Western Maryland *Rail-*

way Company on its books as its own obligations. Such of said bonds as had not been retired prior to the consolidation of 1917 remained outstanding after 1917 and were recognized by the plaintiff on its books as its own obligations.

All of the above-mentioned companies were common carriers subject to the rules and regulations of the Interstate Commerce Commission and kept their books of accounts upon the accrual basis as required by said Interstate Commerce Commission.

No part of the above-mentioned discounts of $3,021,351.67 and $617,100.00 was brought forward as such or amortized on the books of the plaintiff or amortized in its reports to the Interstate Commerce Commission.

The Interstate Commerce Commission's Classification of Income, Profit and Loss, and General Balance Sheet Accounts for Steam Roads, Issue of 1914, Effective on July 1, 1914, is attached hereto and made a part hereof as Exhibit B.

Attached hereto and made a part hereof as Exhibit C are copies of communications with respect to Plaintiff's accounts received by the plaintiff from Alexander Wylie, Director of the Bureau of Accounts of the Interstate Commerce Commission.

(4) For the year 1920 the plaintiff duly filed its income and profits tax return showing a tax liability of $4,259.28 which was paid in four equal installments of $1,064.82 on March 15, June 18, October 11, and Decem-
(44) ber 13, 1921; that the first two of said installments were paid to former Collector of Internal Revenue, Joshua W. Miles, and that the balance of said tax was paid to the defendant, Galen L. Tait, Collector of Internal Revenue; that on January 6, 1925 the plaintiff filed a claim for credit in the amount of $8,079.60, based upon the contention that in its said return the plaintiff failed to deduct from income an item of $80,796.24, being the annual aliquot portion of the above-mentioned bond discounts; that said claim for credit was rejected by the Commissioner of Internal Revenues; that on February 11, 1928 an additional tax of $88,417.89, together with interest amounting to $10,400.61, was assessed by the Commissioner of Internal Revenue, which was discharged

by the application of a credit in the amount of $34,470.99 and the payment on March 21, 1928 of the balance thereof.

(5) For the year 1921 the plaintiff duly filed its income and profits tax return showing a tax liability of $51,148.05, which was paid in four equal installments on April 15, June 21, September 15, and December 15, 1922; that on January 6, 1925 a claim for credit in the amount of $8,079.60 was filed, based upon the contention that the plaintiff failed to deduct from income in its said return the annual aliquot portions of said bond discounts amounting to $80,796.24; that said claim for credit was rejected by the Commissioner of Internal Revenue.

(6) For the year 1922 the plaintiff duly filed its income tax return showing a tax liability of $11,168.43 which was duly paid in four equal installments on March 15, June 16, September 24, and December 15, 1923; that on January 6, 1925 a claim for credit was filed based on the contention that the plaintiff failed to deduct from income in said return the annual aliquot portions of said bond discounts amounting to $80,796.24; that said claim for credit was rejected by the Commissioner of Internal Revenue.

(7) For the year 1923 the plaintiff duly filed its income tax return showing a tax liability of $181,657.04 (45) which was paid in four equal installments of $45,414.26 on March 15, June 14, September 15, and December 15, 1924; that on October 11, 1930, an additional tax of $45,758.60, together with interest amounting to $16,524.18, was assessed against the plaintiff by the Commissioner of Internal Revenue, which was discharged by the application of over-assessments for the years 1924 and 1925 on October 23, 1930, and by the payment of $11,554.97 on December 5, 1930; that in making said additional assessment the Commissioner of Internal Revenue disallowed as a deduction from income an item of $80,796.24, being the annual aliquot portions of the above-mentioned bond discounts; that the plaintiff duly and timely filed a claim for refund in the amount of $10,099.53 based upon the contention that the Commissioner of Internal Revenue erroneously disallowed said deduc-

tion; that said claim for refund was rejected by the Commissioner of Internal Revenue.

(8) For the year 1924 the plaintiff duly filed its income tax return showing a tax liability of $163,024.40, which was paid in four equal installments of $25,756.10 on March 16, June 16, September 18, and December 17, 1925; that in said return the plaintiff deducted from income an item of $80,796.24, being the annual aliquot portions of the above-mentioned bond discounts for the year 1924; that in his final determination of the plaintiff's tax liability for said year 1924, the Commissioner of Internal Revenue disallowed said deduction; that the plaintiff duly and timely filed claims for refund based upon the contention that the Commissioner of Internal Revenue erroneously disallowed the said deduction; that said claims for refund have been rejected by the Commissioner of Internal Revenue.

(9) For the year 1925 the plaintiff filed its income tax return showing a tax liability of $238,936.79 which was paid in installments of $57,344.83, $57,344.83, $62,123.57, and $62,123.56 on March 16, June 16, September 16 and December 16, 1926, respectively; that in said return the plaintiff deducted from gross income an item of $80,796.24, being the annual aliquot portions of the above-mentioned bond discounts applicable to said year (47) 1925; that in his final determination of the tax liability of the plaintiff the Commissioner of Internal Revenue disallowed said deduction; that plaintiff duly and timely filed claims for refund based upon the contention that the Commissioner erroneously disallowed said deduction; that the said claims for refund have been rejected by the Commissioner of Internal Revenue.

(10) In the determination of the plaintiff's taxable net income for the said years 1920, 1921, 1922, 1923, 1924, and 1925, the Commissioner of Internal Revenue did not allow as a deduction from plaintiff's income any part of said bond discount.

Thereupon the defendants submitted to the Court a request for conclusions of law on the 28th day of May, 1931, as follows:

"It is requested that the Court find and return as a conclusion of law that the plaintiff, in the determination of his (its) tax liability for the years in question, is not entitled to authorize and deduct from income for said years any portion of the bond discount herein involved."

Thereupon the defendants submitted to the Court a request for special finding of facts on the 28th day of May, 1931, as follows:

"It is requested that the Court make and return in the above mentioned cases special finding of facts in the manner of and as set forth in the stipulation of facts filed herein."

Thereupon the defendant submitted to the Court a motion for judgment in favor of the defendants on the 28th day of May, 1931, as follows:

"The defendants herein, and each of them, move the Court for judgment in favor of the defendants."

Thereupon, the evidence being closed, the Court rendered its opinion which was transcribed and filed in the (47) record of the case in the Clerk's office on the 20th day of October, 1931, as follows:

"These are three suits brought by the Western Maryland Railway Company to recover the sum of $56,557.36 in income taxes, for the six calendar years 1920 to 1925, inclusive, which it claims were erroneously and unlawfully assessed against and collected from it. The precise question involved is whether the railway company had the right to deduct, in its income tax returns for each of these years, an amortized portion of the bond discount arising from the sale of bonds by its two predecessors in ownership of the property against which the bonds were issued.

"The cases having been consolidated, were heard together, by the Court, upon a lengthy stipulation of facts, which narrates the complete details of two reorganizations of the railroad, one in 1908-1910, the other in 1917. Suffice it to summarize the material facts necessary to a

proper understanding of the present controversy, as follows. On October 1, 1902, a first mortgage, authorizing a $50,000,000 bond issue, was placed upon the properties of the Western Maryland Rail Road Company. Bonds to the extent of $42,518,000, maturing in 1952, were sold under this mortgage from year to year, at a total discount of $3,021,351.67 until 1908, when a $10,000,000 second mortgage on the railroad's property became in default; a receiver was appointed; the property was sold under foreclosure proceedings in the United States Circuit Court for the District of Maryland, and was purchased by a reorganization committee. A new company known as The Western Maryland Railway Company, was formed, which took over the property from the reorganization committee, and began operating the same lines of railroad on January 1, 1910. As of this date, it set up the face amount of the bonds already outstanding as a charge to the cost of property. No separate entry was made of the discount.

"The Railway Company issued $10,000,000 of preferred stock to the holders of the second (foreclosed) mortgage bonds, and an additional amount of common stock to cover their unpaid interest coupons. $50,000,000 of common stock was issued, and upon payment of $40 per share by way of assessment, the holders of the old common stock were entitled to a share for share exchange for the new common stock. The controlling stock interests remained the same, and there were only slight changes in the management of the railroad. The first mortgage of 1902 remained a first mortgage on the property in the hands of The Western Maryland Railway Company, and in 1910 and 1911, $4,115,000 additional first mortgage bonds, still bearing the name of Western (48) Maryland Rail Road Company, were sold by the Railway Company. A further discount of $617,100 was incurred in this sale of bonds. None were sold thereafter.

"In 1915 and 1916 The Western Maryland Railway Company defaulted in interest upon certain secured promissory notes, and in 1917 a new corporation, which is the present plaintiff, Western Maryland Railway Company, was created by a consolidation of The Western Maryland Railway Company and seven subsidiary companies of the latter operating in both Maryland and Pennsylvania. The plaintiff issued two classes of pre-

ferred stock. Its first preferred stock discharged the lien of the defaulted promissory notes, and the second preferred stock took the place of the preferred stock of The Western Maryland Railway Company. The common stock was exchanged, share or share, for that of The Western Railway Company without assessment. No change whatever took place in the management, and the old mortgage of 1902, with the bonds sold under it, remained a first lien on the property in the hands of the plaintiff.

"The plaintiff made a contention, similar to the one now presented, before the Board of Tax Appeals with respect to its income tax returns for the year 1918 and 1919. The Board refused to permit the deduction, basing its denial primarily upon the fact that a new corporation had been created as a result of the consolidation that took place in 1917, and that the new corporation, in taking over the property and assuming the debts of the old one, had paid no discount on the bonds, and consequently was not entitled to amortize discount. However, the Circuit Court of Appeals, on petition to review, reversed this decision of the Board of Tax Appeals, 33 F. (2d) 695. Plaintiff contends that this decision of the appellate court is *res adjudicata* of the present controversy for the following reasons: (1) the present suit involves the same discount upon the same bonds as did the former litigation, except for different years, which is immaterial in the application of the principle of *res adjudicata;* (2) the same Revenue Act involved in the former suit, namely, that of 1918, is applicable to the year 1920, here involved; and the Acts of 1921 and 1924, which govern the remaining years here involved, are identical, on the question of amortization of discount, with the Act of 1918.

"The Government does not deny the correctness of these two premises. Indeed they are not controvertible. See *City of New Orleans* vs. *Citizens Bank of Louisiana*, 167 U. S. 371. But the Government does deny that the facts, as stipulated in the present suits, justify a conclusion that it is precluded by what the Circuit Court of Appeals decided in the former case, because, as the (49) Government asserts, the issue here presented is different. In other words, it contends that the evidence submitted to the Board of Tax Appeals and to the Circuit

Court of Appeals did not disclose that the bonds in question were issued by a corporation whose assets were sold, in a receivership proceeding, to a new corporation, the stockholders of which differed to a material extent from the stockholders of the insolvent corporation; that the case before the Circuit Court of Appeals presented the question of law as to whether or not a corporation, which acquired assets through the merging of several other corporations, is entitled to amortize discount arising from the issue of bonds by one or more of the merging corporations, whereas in the present proceeding the principal question to be decided is whether or not the purchaser of property at a receiver's sale is entitled to amortize discount on bonds issued by the insolvent when the purchaser assumes liability under such bonds, as part of the purchase price of the assets,—a question which the Government contends, was not before the Circuit Court of Appeals in the earlier case. The Government admits that in the present proceeding, in so far as it relates to bonds with a face value of $4,115,000.00 issued by The Western Maryland Railway Company, which for convenience we may properly call Company No. 2, at a discount of $617,100.00, the question is the same as that presented in the earlier case; but not as to bonds with a face value of $42,518,000.00 issued at a discount of $3,021,351.67, by the Western Maryland Railroad Company, for convenience called Company No. 1, which subsequently became insolvent.

"An examination of the record before the Circuit Court of Appeals in the earlier case, and the ratio *decidendi* of that Court's opinion, convinces us that the Government's contention is untenable. It is true that in the former litigation, the 1917 change of corporate structure, and not the change of 1908-1910, was the one which was stressed, and therefore the one primarily in issue. But the earlier reorganization was before the Board of Tax Appeals and the appellate court in the stipulation of facts and in the pleadings. This is confirmed by the following statement in the opinion of the Circuit Court of Appeals, (page 696), in which it is true it consolidates the bond issue of the first company, the Western Maryland Rail Road Company of the total face value of $42,518,000 with the bond issue of the second company, The Western Maryland Railway Company (the immediate

predecessor of the present plaintiff), of the total face value of $4,115,000, and a grand total of $46,633,000; and similarly, consolidates the items of discounts; but the two reorganizations were of necessity before the Court: 'The facts as to the bonded indebtedness and the discount are that between April, 1904, and August, 1911, the corporation which was the predecessor of the petitioner, the Western Maryland Railway Company, issued and sold $46,633,000 of first mortgage 4 per cent bonds, (50) dated October 1, 1902, and maturing October 1, 1952, at a discount of $3,638,451.67. This discount was set up on the books of the company as of January 1, 1910, and the annual proportion thereof, amounting to $80,796.24, was charged off each year thereafter.'

"After stating (page 698) that 'the consolidated corporation has stepped into the place of the corporation which issued the bonds, and occupies the same relationship towards them that it occupied', the court continued, pages 698-699: 'In the second place, we think that, irrespective of the practical identity of the old and new corporations, petitioner is entitled to the deduction claimed because of having taken over the assets and assumed the liabilities of the old corporation which was unquestionably entitled to it. Among the liabilities of the old corporation as shown by its books was the bond issue; and among its assets was the amount set up as bond discount, against which was charged each year an amortized portion thereof. In taking over the liabilities and assets, the new corporation took the place of the old as to both of those items. As has been said, bond discount is really deferred interest payable at the maturity of the bonds. When, therefore, the new corporation assumed the obligations of the old, its agreement to pay the bonds at maturity embraced necessarily the agreement to pay this deferred interest, which is included in the face of the bonds. As the new corporation is bound to pay this, there is no reason why it should not amortize it in the same way as the old corporation.

"'It is argued, however, that the new corporation has agreed to pay the full face of the bonds in consideration of the assets transferred to it, and that, for this reason, it has received full consideration for them and has suffered no discount. But this by no means follows.

The fact that bonds have been sold at a discount presupposes that the interest rate which they carry is less than the prevailing rate at the time of sale; and it is but fair to assume that this has been taken into account in the price paid or the terms agreed upon for the transfer of the corporate assets. The matter takes care of itself in the case of a reorganization such as this; for it is manifest that, as the discount was mirrored in the affairs of the old corporation by the fact that its actual assets were that much less than they would have been had the discount not been exacted, it is mirrored in exactly the same way when the assets pass into the hands of the reorganization. As a man cannot lift himself by his own bootstraps, so a corporation cannot, by a mere process of reorganization, increase its actual assets or wipe out the fact that it is bound to pay bond discount which is in reality deferred interest.'

"If the aforegoing reasoning is to be given proper interpretation, it must be taken as being just as applicable to a plurality, or series of consolidations, as it is (51) to a single one, provided the same essential elements are always successively present, namely, acquisition by the successor corporation of the particular assets and liabilities of its predecessor. If these do exist, then the precise manner of acquisition is not, as the Government contends, material. Company No. 1 was sold to Company No. 2 under foreclosure proceedings, whereas Company No. 2 was merged into Company No. 3 by a consolidation of itself and seven of its subsidiary companies. But the original mortgage under which all the bonds here involved had been issued, still remains a first lien on the original property, now in the hands of the plaintiff, just as it had been when the property was in the hands of the plaintiff's two predecessors.

"Thus we must conclude that further litigation of the question here raised is precluded by the decision of the Circuit Court of Appeals, because the same material facts were before that Court. In its last analysis the Government's contention but comes to this: either that the available grounds for argument against plaintiff's contention were not made the dominant issue in the previous litigation, or that the Government is now seeking to obtain, through this Court, a modification of the appellate court's ruling which, of course, may only be sought by

a petition for rehearing, or for a writ of certiorari to the Supreme Court, seasonably made, neither of which has been done. As was said in *Grubb* vs. *Public Utilities Commission*, 281 U. S. 470, at 478-9: 'The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Worlein* v. *New Orleans*, 177 U. S. 390, 398, *et seq.*; *United States* v. *California and Oregon Land Co.*, 192 U. S. 355, 358.

"'As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res adjudicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *United States* v. *Moser*, 266 U. S. 236, 241; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.' See also, *Southern Pacific R. Co.* vs. *U. S.* 168 U. S. 1.

"The identity of the amortization of discount provision in the revenue acts here involved, with the corresponding provision in the Act of 1918, has already been alluded to. Therefore, since the Circuit Court of Appeals has held the deduction permissible under the one, (52) we must hold likewise under the others.

"Finally, in answer to the argument that the appellate court proceeded upon the mistaken assumption that the plaintiff had actually set up upon its books the amortization of the discount, it is enough to say, (1) that such a mistake of fact, regardless of its materiality, may not now be attacked. *Vinson* vs. *Graham*, 44 F. (2d) 772; and that (2) bookkeeping entries cannot be permitted to control over the actual facts. *Doyle* vs. *Mitchell Brothers Co.*, 247 U. S. 179. And so the Board of Tax Appeals has itself repeatedly held. *C. R. I. & Pac. Ry. Co.* vs. *Commisisoner*, 13 B.T. A. 988; *Kansas City So. Rwy. Co.* vs. *Commissioner*, 16 B. T. A. 665; *Terminal*

Railroad Association of St. Louis vs. *Commissioner*, 17 B. T. A. 1135.

"Accordingly, the verdict must be for the plaintiff in the sum of $56,557.36, together with interest at the rate of 6% per annum on each of the respective payments which comprise said total amount, from the respective date of its payment or collection for such a period as is provided in Section 177 of the Judicial Code as amended (28 U. S. C. A. Sec. 284)."

To the action of the Court in its finding of facts, conclusions of law and judgment for the plaintiff, as set forth in said opinion to the Court, the defendant excepts and prays the Court to sign and seal this, its first Bill of Exceptions, which is accordingly done this 29th day of January, 1932.

WILLIAM C. COLEMAN (Seal)
United States District Judge.

Approved:

EUGENE S. WILLIAMS,
Attorney for Plaintiff.
SIMON E. SOBELOFF,
United States Attorney,
Attorney for Defendant.

ASSIGNMENT OF ERRORS.

(53) Filed 15th January, 1932.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

(Style of court and Title omitted.)

And now comes Galen L. Tait, Collector of Internal Revenue, defendant in the above entitled cases, by his attorney, Simon E. Sobeloff, United States Attorney in and for the District of Maryland, and makes and files the following assignment of errors, and says that the judgment entered in these actions on the 20th day

of October, 1931, is in error and unjust for the following reasons:

(54) First: That the United States District Court for the District of Maryland erred in refusing to grant the defendant's motion for judgment in favor of the defendant.

Second: That said Court erred in finding a judgment for the plaintiff in the amount of Fifty-six Thousand, Five Hundred Fifty-seven Dollars and Thirty-six Cents ($56,557.36).

Third: That said Court erred in refusing to grant the request of the defendant for the conclusion of law that the plaintiff, in the determination of its tax liability for the years in question, is not entitled to authorize and deduct from income for said years any portion of the bond discount herein involved.

Fourth: That said Court erred in refusing to grant the request of the defendant for special finding of facts in the manner of and as set forth in the stipulation of facts filed herein.

Wherefore, defendant prays that the said judgment of the United States District Court for the District of Maryland be reversed, and the cause remanded with instructions to reverse said judgment and to enter judgment for defendant, and for such other and further relief as may be proper in the premises.

SIMON E. SOBELOFF,
United States Attorney.

STIPULATION OF COUNSEL AS TO MAKING UP RECORD ON APPEAL.

(55) Filed 8th July, 1932.

(Style of court and Title omitted.)

It is hereby stipulated that the record in this case

shall be printed in accordance with Rule 23 of the Circuit Court of Appeals for the Fourth Circuit and that there shall be included in the record to be certified and transmitted to the Clerk of that Court and to be printed by him the following documents:

1. Amended declaration in Law Number 4172.

2. Pleas to amended declaration in Law Number 4172.

(56) 3. Declaration in Law Number 4174.

4. Pleas to declaration in Law Number 4174.

5. Petition in Law Number 4177.

6. Amended declaration in Law Number 4469.

7. Pleas to amended declaration in Law Number 4469.

8. Stipulation waiving jury trial.

9. Petition of Plaintiff and Order of Court consolidating cases 4172 and 4174 with 4469.

10. Petition, assent and Order of Court consolidating Law Number 4177 with 4172, 4174 and 4469.

11. Verdict and judgment.

12. Order of Court extending time for signing and filing bill of exceptions.

13. Bill of exceptions, including opinion of Court.

14. Plaintiff's prayers.

15. Assignment of errors.

16. This stipulation.

17. It is further stipulated and agreed that the

Clerk need not incorporate the exhibits A, B, C and D, referred to in the stipulation of facts (included in the bill of exceptions), but in lieu thereof that the originals of said exhibits be transmitted to the Appellate Court for use in argument by either side.

SIMON E. SOBELOFF,
United States Attorney,
Attorney for Defendants-Appellants.
EUGENE S. WILLIAMS,
Attorney for Plaintiff-Appellee.

Approved by:

WILLIAM C. COLEMAN,
United States District Judge.

MEMORANDUM OF THE CLERK.

(57) (1) Petition for Appeal, filed 15th January, 1932.

(2) Appeal granted, 15th January, 1932.

(3) Citation dated 16th January, 1932. (Service acknowledged 25th January, 1932.)

ORDER TO TRANSMIT RECORD.

And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings of the causes aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Maryland, to-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true transcript of the record and proceedings of the said District Court together with all things thereunto relating, in the therein entitled causes, made up in accordance with stipulation of counsel for the respective parties filed in said cause.

In Testimony Whereof I hereunto set my hand and affix the seal of said District Court this 14th day of July, 1932.

(Seal of Court) ARTHUR L. SPAMER, Clerk.

Richmond Press, Inc.,
Richmond, Va.
7-18-32—65.
Contract No. J-8880.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3367

GALEN L. TAIT, COLLECTOR OF INTERNAL REVENUE, APPELLANT

versus

WESTERN MARYLAND RAILWAY COMPANY, APPELLEE

APPEAL from the District Court of the United States for the District of Maryland, at Baltimore. At law

July 15, 1932, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, and citation are certified up under sec. 7 of rule 14.

Same day, petition of appellant, consented to by counsel for appellee, for extension of time, and order thereon dated May 20, 1932, signed by Senior Circuit Judge Parker, extending the time to June 15, 1932, for the filing of the transcript of record, filed.

Same day, petition of appellant, consented to by counsel for appellee, for extension of time, and order thereon dated June 10, 1932, signed by Senior Circuit Judge Parker, extending the time to July 15, 1932, for the filing of the transcript of record, filed.

Same day, the appearance of Simon E. Sobeloff, U. S. attorney, and Charles G. Page, assistant U. S. attorney, is entered for the appellant.

Same day, originals of plaintiff's Exhibits A, B, C, and D are certified up.

July 30, 1932, the appearance of Eugene S. Williams is entered for the appellee.

September 12, 1932, twenty-five copies of the printed record are filed.

September 16, 1932, stipulation as to the time for the filing of the respective briefs is filed.

Argument of cause

October 21, 1932 (October term, 1932), cause came on to be heard before Parker, Northcott, and Soper, circuit judges, and is argued by counsel and submitted.

Opinion

Filed January 10, 1933

United States Circuit Court of Appeals, Fourth Circuit

No. 3367

GALEN L. TAIT, COLLECTOR OF INTERNAL REVENUE, APPELLANT

versus

WESTERN MARYLAND RAILWAY COMPANY, APPELLEE

APPEAL from the District Court of the United States for the District of Maryland, at Baltimore

Argued October 21, 1932. Decided January 10, 1933

Before PARKER, NORTHCOTT, and SOPER, Circuit Judges

Charles G. Page, assistant U. S. attorney, and Simon E. Sobeloff, U. S. attorney (G. A. Youngquist, Assistant Attorney General, Sewall Key and J. Louis Monarch, special assistants to the Attorney General, on brief) for appellant, and Eugene S. Williams for appellee.

SOPER, Circuit Judge:

This case renews the controversy that was before this court in Western Maryland Railway Company vs. Commissioner of Internal Revenue, 33 F. (2d) 695, upon a petition to review a decision of the Board of Tax Appeals with regard to the income-tax liability of the Railway Company for the years 1918 and 1919. The board had denied the right of the Railway Company to deduct from its gross income for these years an amortized portion of a discount of $3,638,451.67, at which bonds in the amount of $46,633,000, that the Railway Company was bound to pay, had been previously sold. Two questions were presented in that case, as an examination of the decision of this court and the decision of the board, 12 B. T. A. 889, will disclose. They were (1) whether the discount on bonds sold by a corporation below par may be amortized for income-tax purposes over the life of the bonds by deducting a proportionate part of the discount each year as accrued interest from the gross income; and (2) whether Western Maryland Railway Company, a corporation formed under the laws of Maryland by the consolidation of a predecessor corporation and seven subsidiary corporations fully owned by it, was entitled to amortize the discount on bonds which had been issued before it came into existence, and which it had undertaken to pay. Both questions were decided in favor of the Railway Company and the decision of the Board of Tax Appeal was reversed.

The Board of Tax Appeals had held that whatever rights the Railway Company derived from the consolidation with its subsidiary

companies neither it nor its predecessor was entitled to deduct from gross income an amortized proportion of the discount. When the case was argued in this court, the commissioner did not rely on this point for the reason that in the meantime the board had held to the opposite effect in Chicago, R. I. & P. R. Co. vs. Commissioner (13 B. T. A. 988). Hence it was not denied that the Railway Company had the right to amortize the discount on the bonds if it succeeded to this right in the corporate reorganization, and the question discussed was whether the new corporation was so distinct and separate an entity that it did not acquire the right which its predecessor might have enjoyed. A decision on the propriety of amortization of discount, however, was necessary to the determination of the controversy, and it was discussed at some length in our former opinion in the light of regulations 45 of the Treasury Department, article 554, and of the decisions of the courts.

The pending case involves the same points with respect to the income tax of the railway company for the years 1920 to 1925. A suit was brought by the Railway Company against the collector of internal revenue of the United States for the district of Maryland in three counts, claiming refunds in the aggregate sum of $26,258.77, paid by the taxpayer for the years 1920 to 1922, through error in failing to amortize the discount in these years; and a separate suit against the collector for the aggregate sum of $30,298.59 paid for the years 1923 to 1925 under duress, after a deduction for the amortized discount made by the taxpayer in his income-tax return for each of said years had been disallowed by the Commissioner of Internal Revenue. There were also two other suits brought by the Railway Company against the United States, each of which was limited to the year 1920 and covered as to that year precisely the same claim as the first count of the first suit above described. All of the cases were consolidated by order of the District Court, and the matter being tried before the court without a jury upon a stipulation of facts a veriet was found for the sum of $56,557.36, the full amount of the plaintiff's claim. An appeal was taken from the refusal of the district judge to rule that under the stipulated facts the plaintiff was not entitled to recover.

We are asked to review our decision in the former litigation because of the later decision of the Supreme Court in Old Colony R. R. Co. vs. Commissioner, 284 U. S. 552. The Supreme Court held that a premium on bonds received by a corporation prior to the adoption of the sixteenth amendment was income for the year in which it was received, and no part of it may be taxed by a subsequent income tax act; and that in so far as such a premium is concerned, Treasury regulations were ineffective which provided that if bonds are issued at a premium the net amount is income which should be amortized over the life of the bonds. The approval by Congress, implied from repeated reenactments, of the interpretation of the

income-tax statutes embodied in these regulations, was held to be of no avail since the premium received had become principal prior to the sixteenth amendment and could not be reached by subsequent legislation. The case now before us is not precisely the same, for although all the bonds were issued prior to the amendment, we have to do with a discount and not with a premium, and the same constitutional difficulty does not arise. It may be questioned, however, whether regulations, which purport to authorize the amortization of discount and premium alike, can reasonably be construed to apply only to discount allowed before the amendment, when it is shown that they are invalid as to premium received at that time.

A determination of this question is not necessary to a decision of this case, for, in our opinion, the right of the Railway Company to amortize the discount on the bonds was conclusively settled by the earlier decision of this court. The applicable rule is succinctly stated in Southern Pacific R. R. Co. vs. U. S., 168 U. S. 1, as follows:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

See also United States vs. Moser, 266 U. S. 236, 241. This principle applies to cases of taxation as well as to other subjects of litigation. New Orleans vs. Citizens Bank, 167 U. S. 371; Gunter vs. Atlantic Coast Line, 200 U. S. 273; United States vs. Stone & Downer Co., 274 U. S. 225, 230.

We are told that the doctrine of res adjudicata is not applicable in this case even to the limited extent which obtains when the subsequent cause of action arises between the same parties upon a different claim or demand, because the present controversy arises upon different facts and between different parties. The difference of fact relates to the history of the corporate organizations which preceded the present taxpayer. The present record shows that the bonds in question were issued under a mortgage executed October 1, 1902, by Western Maryland Railroad Company, a Maryland corporation (company No. 1), and that during the period from October, 1902, to December, 1908, this corporation issued $42,518,000 face value of bonds at a discount of $3,021,351.67. A receiver was appointed for this company and under proceedings to foreclose a second mortgage, all of the property of the corporation was sold and conveyed to The Western Maryland Railway Company (company No. 2), a new corporation created under the laws of Maryland, which, as part of the

purchase price, assumed the obligation of the first mortgage of its predecessor. In July and August, 1911, company No. 2 sold an additional $4,115,000 of bonds secured by the first mortgage of company No. 1 at a discount of $617,100. The second company operated the property from 1910 until 1917, when it was consolidated with the seven subsidiaries, and the property was conveyed under the consolidation agreement to the present corporation, Western Maryland Railway Company, (company No. 3), subject to the first lien of the bonds sold under the mortgage of 1902.

The point is made that this court in its prior opinion did not consider the company referred to as company No. 1, but treated the case as if the bonds had been issued by company No. 2 under its own mortgage, so that the attention of the court was directed to the question as to whether the present taxpayer was entitled to the rights of the second company, without taking into account the fact that the rights of the second company were obtained from the first. This observation is substantially correct, but the treatment of the facts by the court was due to the following stipulation by the parties, adopted by the Board of Tax Appeals as a finding of fact (which we know judicially from our own records, United States vs. California Canneries, 279 U. S. 553): "These bonds were issued by Western Maryland Railroad Company (company No. 1), a corporation organized under the laws of the State of Maryland, predecessor of, and which for the purposes of this case may be taken as identical with Railway Company (company No. 2). Railway Company succeeded Western Maryland Railroad as of January 1, 1910. * * *"

The parties acted upon this assumption throughout the suit, the commissioner contending that the claim of the taxpayer must fail because it did not itself issue the bonds at a discount but only bound itself to pay them long after they were sold. This contention as we have seen did not then prevail. We are now asked to reexamine the evidence and reach a different conclusion, and the reasons given are that the evidence in the present case shows more clearly the gap between the present corporation and the one which originally issued the greater amount of the bonds; and also that this court did not fully appreciate the force of the facts in the former case which marked the difference between the present company and the one which immediately preceded it. We are not impressed by this argument, for if a question is actually and directly in issue, and is judicially passed upon and determined in a suit, a party bound by the judgment can not escape its effects by producing a new argument or new evidence in a subsequent action in support of the proposition decided against him. Southern Pacific Railroad vs. United States, 168 U. S. 1; Gunter vs. Atlantic Coast Line, 200 U. S. 273, 290; Smith vs. Town of Ontario, 4 F. 386. If the appellee in the pending case is now permitted to produce additional evidence (which, it may be said in passing, was available at the first trial) to prove the

point which was then relied on, the settled rule would be disregarded and the purpose of the doctrine of res judicata to put an end to litigation and to protect a successful litigant from a second trial of a controversy would be defeated.

Nor is there merit in the suggestion that the doctrine of res judicata does not apply because the second suit is not between the same parties as the first. In the earlier case the taxpayer was opposed by the Commissioner of Internal Revenue, and it is conceded by the appellee that the commissioner was acting in his official capacity as a representative of the United States, and that the judgment against him, if otherwise conclusive, should be given full effect in the present suits against the United States. It is urged, however, that the former judgment is not binding on the collector of internal revenue in the present suits against him for the reasons given by this court in Strother vs. Commissioner and Bankers Pocahontas Coal Company vs. Commissioner, 55 F. (2d) 626, affirmed by the Supreme Court on December 5, 1932. In these cases the decision of the Supreme Court in Sage vs. United States, 250 U. S. 33, 39, was relied on and reaffirmed to the effect that a judgment in a former suit brought by a taxpayer against a collector is not res judicata in a later suit brought by the taxpayer against the Commissioner of Internal Revenue of the United States. It was shown in Sage vs. United States that a judgment in a suit against a collector is not technically a judgment against, or in favor, of the United States: that the suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different; that at the time the judgment is entered, the United States is a stranger, and subsequently the discretionary action of officials may or may not give the United States a practical interest in the amount of the judgment. But it does not follow that a collector of internal revenue may not be bound by a judgment rendered in a prior suit against the United States, or the Commissioner of Internal Revenue, acting in its behalf. Taxes erroneously collected by a collector of internal revenue are received by him in his capacity as an agent of the United States, and if it has been subsequently determined by the judgment of a court that his principal was not entitled to receive them the agent is bound by the judgment and may not contest the point anew. See Second National Bank of Saginaw vs. Woodward, 54 F. (2d) 672; Bertelsen vs. White, 58 F. (2d) 792. The judgment of the District Court is affirmed.

NORTHCOTT, Circuit Judge, concurring:

I concur, for the reason that I feel myself bound by the former decision of a majority of this court in Western Maryland Railway Co. vs. Commissioner, 33 Fed. (2) 695, in which case I dissented.

Judgment

Filed and entered January 13, 1933

United States Circuit Court of Appeals, Fourth Circuit

No. 3367

GALEN L. TAIT, COLLECTOR OF INTERNAL REVENUE, APPELLANT
vs.
WESTERN MARYLAND RAILWAY COMPANY, APPELLEE

APPEAL from the District Court of the United States for the District of Maryland

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court, in this cause, be, and the same is hereby, affirmed.

January 13, 1933.

MORRIS A. SOPER,
U. S. Circuit Judge.

Order staying mandate

Filed February 4, 1933

(Style of court and title omitted.)

Upon the application of the appellant, by Simon E. Sobeloff, U. S. attorney, his attorney, and for good cause shown.

It is ordered that the mandate of this court in the above-entitled case be, and the same is hereby, stayed for thirty days from this date.

February 4, 1933.

JOHN J. PARKER,
Senior Circuit Judge.

Order further staying mandate

Filed March 3, 1933

(Style of court and title omitted.)

Upon the application of the appellant, by Simon E. Sobeloff, U. S. attorney, his attorney, and for good cause shown,

It is ordered that the mandate of this court in the above-entitled case be, and the same is hereby, further stayed for 30 days from this date.

March 3, 1933.

JOHN J. PARKER,
Senior Circuit Judge.

Clerk's certificate

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 16th day of March, A. D. 1933.

[SEAL.] CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed April 24, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.